UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ALLIED WASTE INDUSTRIES, INC., and BROWNING-FERRIS INDUSTRIES, INC., Defendants.	)	Case No. 1: 99 CV 01962 JUDGE: Ricardo M. Urbina DECK TYPE: Antitrust

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 20, 1999, the United States filed a civil antitrust suit that alleges that the proposed acquisition by Allied Waste Industries, Inc. ("Allied") of Browning-Ferris Industries, Inc. ("BFI") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that in many markets throughout the United States, Allied and BFI are two of the most significant competitors in small container commercial waste collection, disposal of municipal solid waste ("MSW") (*i.e.*,the operation of landfills, transfer stations or incinerators), or both services.

The Complaint alleges that a combination of Allied and BFI would substantially lessen competition in the disposal of municipal solid waste in thirteen highly concentrated markets: Akron/Canton, Ohio; Atlanta, Georgia; Boston, Massachusetts; Charlotte, North Carolina;

Chicago, Illinois; Denver, Colorado; Detroit, Michigan; Evansville, Indiana; Joplin/Lamar and Springfield, Illinois; Kalamazoo/Battle Creek, Michigan; Moline, Illinois; Oakland, California; and Oklahoma City, Oklahoma.

The Complaint alleges that the merger also would substantially lessen competition in the provision of small container commercial waste collection services in fourteen highly concentrated, relevant geographic markets: Akron/Canton, Ohio; Boston, Massachusetts; Charlotte, North Carolina; Chicago, Illinois; Dallas, Texas; Davenport, Iowa/Moline, Illinois; Denver, Colorado; Detroit, Michigan; Evansville, Indiana; Kalamazoo/Battle Creek, Michigan; Oklahoma City, Oklahoma; Rock Falls/Dixon, Illinois; Rockford, Illinois; and Springfield, Missouri.

According to the Complaint, the loss of competition would likely result in consumers paying higher prices and receiving fewer or lesser quality services for the collection and disposal of waste. The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act and (2) a permanent injunction that would prevent Allied from acquiring control of or otherwise combining its assets with those owned by BFI.

At the time the Complaint was filed, the United States also filed a proposed settlement that would permit Allied to complete its acquisition of BFI, provided divestitures of certain waste collection and disposal assets are accomplished in such a way as to preserve competition in the affected markets. This settlement consists of a proposed Final Judgment, a Hold Separate Stipulation and Order, and a letter that outlines a standard on which the United Stated and the defendants have agreed to decide whether waste collection routes that partially serve a given geographic area, or which contain a mix of residential and small container waste collection

customers or franchise or nonfranchised business, should be divested pursuant to the terms of the proposed Final Judgment.[1/]

The proposed Final Judgment orders Allied and BFI to divest commercial waste collection routes in each of the relevant areas in which the Complaint alleges the merger would substantially reduce competition in the provision of small container commercial waste collection services. In addition, the proposed Final Judgment orders Allied and BFI to divest an incinerator, landfills, transfer stations, or disposal rights in such facilities in each of the relevant markets in which the merger would substantially reduce competition in the disposal of municipal solid waste. (A summary of the commercial waste collection and waste disposal assets that defendants must divest pursuant to the Judgment appears below in Appendix A.) Allied and BFI must complete their

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[1] A copy of this correspondence appears in Appendix B. According to the proposed Final Judgment [§§ II (D)(1)-(14), IV and V)], defendants must divest small container commercial waste collection routes that serve customers in certain geographic areas. Since some small container commercial waste collection routes may serve only part of an area defined in the proposed Final Judgment, or may contain a mix of small container commercial and other types of customers (*e.g.*, in Dallas, Texas franchised customers), the United States and the defendants agreed to apply a *de minimis* standard in determining whether a route may be subject to divestiture under the Judgment. The parties agreed that defendants must divest the entire waste collection route if, in its most recent year of operation, the route obtained 10 percent or more of its revenues from the provision of small container commercial waste collection services (and in the case of Dallas, Texas, such services from nonfranchised commercial customers), or 10 percent or more of such revenues are generated by customers located in a geographic area specified in the Judgment.

Applying this standard to the Boston area, for example, the proposed Final Judgment would require defendants to divest any Allied route (or any route that BFI acquired from Allied or any other person after January 1, 1999), if the route obtained 10 percent or more of its revenues from commercial waste collection customers who have business locations in the City of Boston, or Bristol, Essex, Middlesex, Norfolk, Suffolk, or Worcester counties, MA.

divestitures of the waste collection and disposal assets within 120 days after July 20, 1999, or five days after entry of the proposed Final Judgment, whichever is later.

The Hold Separate Stipulation and Order ("Hold Separate Order") and the proposed Final Judgment ensure that until the divestitures mandated by the Judgment are accomplished, the currently operating waste collection and disposal assets that are to be divested will be maintained and operated as saleable, economically viable, ongoing concerns, with competitively sensitive business information and decision-making divorced from that of the combined company. Allied and BFI, subject to the United States' approval, will appoint a person to manage the operations to be divested and ensure defendants' compliance with the requirements of the proposed Final Judgment and Hold Separate Order.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE VIOLATIONS ALLEGED IN THE COMPLAINT

A. The Defendants and the Proposed Transaction

Allied is the third largest waste collection and disposal firm in the United States. Based in Scottsdale, Arizona, it provides waste collection and disposal services in over 20 states. In 1998, Allied's total operating revenues were in excess of $1.6 billion.

BFI, based in Houston, Texas, is the nation's second largest waste collection and disposal firm. It provides waste collection and disposal services throughout the country, often in direct

competition with Allied. During its 1998 fiscal year, BFI had total domestic operating revenues of over $4.7 billion.

In March 1999, Allied announced its agreement to acquire BFI in a stock transaction worth nearly $9.4 billion. This transaction, which would combine two major waste industry competitors and substantially increase concentration in a number of already highly concentrated, difficult-to-enter waste markets, precipitated the United States's antitrust suit.

B. The Competitive Effects of the Transaction

Waste collection firms, or "haulers," contract to collect municipal solid waste ("MSW") from residential and commercial customers; they transport the waste to private and public disposal facilities (*e.g.*, transfer stations, incinerators and landfills), which, for a fee, process and legally dispose of waste. Allied and BFI compete in operating waste collection routes and waste disposal facilities.

1. The Effects of the Transaction on Competition in the Markets for Small Container Commercial Waste Collection Services.

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into special routes, and use specialized equipment to store, collect and transport waste from these accounts to approved disposal sites. This equipment -- one to ten cubic yard containers for waste storage, plus front-end (and sometimes, rear-end) loader vehicles for collection and transportation -- is uniquely well suited to the

provision of small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for small container commercial waste collection firms. In their waste collection efforts, other firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*,side-load trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect or transport waste generated by commercial accounts, and hence, are rarely used on small container commercial waste collection routes. For purposes of antitrust analysis, the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for analyzing the effects of the merger.

The Complaint alleges that the provision of small container commercial waste collection services takes place in compact, highly localized geographic markets. It is expensive to ship waste long distances in either collection or disposal operations. To minimize transportation costs and maximize the scale, density, and efficiency of their waste collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Sheer distance may significantly limit a distant firm's ability to provide commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local commercial customers without losing significant sales to firms outside the area.

Applying that analysis, the Complaint alleges that fourteen areas -- Akron/Canton, Ohio; Boston, Massachusetts; Charlotte, North Carolina; Chicago, Illinois; Dallas, Texas; Davenport,

Iowa/Moline, Illinois; Denver, Colorado; Detroit, Michigan; Evansville, Indiana; Kalamazoo/Battle Creek, Michigan; Oklahoma City, Oklahoma; Rock Falls/Dixon, Illinois; Rockford, Illinois; and Springfield, Missouri -- constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Allied and BFI in the provision of small container commercial waste collection services. In each of these markets, Allied and BFI are two of the largest competitors, and the combined firm would command from 25 percent to 85 percent or more of total market revenues. These fourteen small container commercial waste collection markets generate from $2.5 million to over $200 million in annual revenues.

New entry into these markets would be difficult, time consuming, and is unlikely to be sufficient to constrain any post-merger price increase. Many customers of commercial waste collection firms have entered into "evergreen" contracts, tying them to a market incumbent for indefinitely long periods of time. In competing for uncommitted customers, market incumbents can price discriminate, *i.e.,* selectively (and temporarily) charge unbeatably low prices to customers targeted by entrants, a tactic that would strongly discourage a would-be competitor from competing for such accounts, which, if won, may be very unprofitable to serve. Taken together, the prevalence of long term contracts and the ability of market incumbents to price discriminate substantially increases any would-be new entrant's costs and time necessary for it to build its customer base and obtain efficient scale and route density to become an effective competitor in the market.

The Complaint alleges that a combination of Allied and BFI would likely lead to an increase in prices charged to consumers of commercial waste collection services. The acquisition

would diminish competition by enabling the few remaining competitors to engage more easily, frequently, and effectively in coordinated pricing interaction that harms consumers. This is especially troublesome in markets where entry has not proved an effective deterrent to the exercise of market power.

2. The Effects of the Transaction on Competition in Other Markets for Disposal of Municipal Solid Waste.

A number of federal, state and local safety, environmental, zoning and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. MSW can only be sent for disposal to a transfer station, sanitary landfill, or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in a facility that has not been approved for disposal of such waste risks severe civil and criminal penalties. Firms that compete in the disposal of MSW can profitably increase their charges to haulers for disposal of MSW without losing significant sales to other firms. For these reasons, there are no good substitutes for disposal of MSW.

Disposal of MSW tends to occur in highly localized markets.[2/] Disposal costs are a significant component of waste collection services, often comprising 40 percent or more of overall operating costs. It is expensive to transport waste significant distances for disposal. Consequently, waste collection firms strongly prefer to send waste to local disposal sites. Sending a vehicle to dump waste at a remote landfill increases both the actual and opportunity costs of a hauler's collection service. Natural and man-made obstacles (*e.g.*, mountains and traffic congestion), sheer distance and relative isolation from population centers (and collection operations) all substantially limit the ability of a remote disposal site to compete for MSW from closer, more accessible sites. Thus, waste collection firms will pay a premium to dispose of waste at more convenient and accessible sites. Operators of such disposal facilities can -- and do -- price discriminate, *i.e.*, charge higher prices to customers who have fewer local options for waste disposal.

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[2] Though disposal of municipal solid waste is primarily a local activity, in some densely populated urban areas there are few, if any, local landfills or incinerators available for final disposal of waste. In these areas, transfer stations are the principal disposal option. A transfer station collects, processes and temporarily stores waste for later bulk shipment by truck, rail or barge to a more distant disposal site, typically a sanitary landfill, for final disposal. In such markets, local transfer stations compete for municipal solid waste for processing and temporary storage, and sanitary landfills may compete in a broader regional market for permanent disposal of area waste.

In this case, in several relevant areas (*e.g.*, Akron/Canton, Atlanta, Charlotte, Chicago, Kalamazoo/Battle Creek, and Springfield), distant landfills may compete with local disposal facilities (incinerators or landfills) through the use of transfer stations. Regional landfills also compete for permanent disposal of waste from these areas. In some areas, however, the proposed Final Judgment requires defendants to divest transfer stations because such divestitures may aid in the competitive viability of a companion landfill, the divestiture of which, the United States believes, is essential for effective relief.

For these reasons, the Complaint alleges that, for purposes of antitrust analysis, thirteen areas -- Akron/Canton, Ohio; Atlanta, Georgia; Boston, Massachusetts; Charlotte, North Carolina; Chicago, Illinois; Denver, Colorado; Detroit, Michigan; Evansville, Indiana; Joplin/Lamar/Springfield, Missouri; Kalamazoo/Battle Creek, Michigan; Moline, Illinois; Oakland, California; and Oklahoma City, Oklahoma -- are relevant geographic markets for disposal of municipal solid waste. In each of these markets, Allied and BFI are two of only a few significant competitors. Their combination would command from 30 percent to well over 90 percent of disposal capacity for municipal solid waste in highly concentrated markets that each generate revenues of from $5 million to over $250 million annually.

Entry into disposal of municipal solid waste is difficult. Government permitting laws and regulations make obtaining a permit to construct or expand a disposal site an expensive and time-consuming task. Significant new entry into these markets is unlikely to occur in any reasonable period of time, and hence, is not likely to prevent exercise of market power after the acquisition.

In each listed market, Allied's acquisition of BFI would remove a significant competitor in disposal of municipal solid waste. With the elimination of BFI, market incumbents will no longer compete as aggressively since they will not have to worry about losing business to BFI. The resulting substantial increase in concentration, loss of competition, and absence of reasonable prospect of significant new entry or expansion by market incumbents likely ensure that consumers will pay substantially higher prices for disposal of MSW, collection of small container commercial waste, or both, following the acquisition.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Provisions of the Judgment

The divestiture relief described in the proposed Final Judgment will eliminate the anticompetitive effects of the defendants' acquisition in the provision of small container commercial waste collection services in, and the disposal of MSW from, the relevant markets by establishing new, independent and economically viable competitors in each affected market. The proposed Final Judgment requires Allied and BFI, within 120 days after July 20, 1999, or five days after notice of the entry of this Final Judgment by the Court, whichever is later, to sell certain commercial waste collection assets ("Relevant Hauling Assets") and disposal assets ("Relevant Disposal Assets") as viable, ongoing businesses to a purchaser or purchasers acceptable to the United States, in its sole discretion. The collection assets to be divested include small container commercial waste collection routes, trucks, customer lists, and if requested by the purchaser, garage facilities. The disposal assets to be divested include an incinerator, landfills, transfer stations, airspace disposal rights at landfills and an incinerator, and certain other assets critical to successful operation of such facilities (*e.g.*, leasehold and renewal rights in the particular landfill or transfer station, garages and offices, trucks and vehicles, scales, permits, and intangible assets such as landfill or transfer station-related customer lists and contracts).

If Allied and BFI cannot accomplish the divestitures within the prescribed period of time, the proposed Final Judgment provides that the United States may appoint a trustee to complete the divestiture of each relevant disposal asset or relevant hauling asset not sold. The proposed Final Judgment generally provides that the assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the purchaser as part of

a viable, ongoing business or businesses engaged in waste collection or disposal that can compete effectively in the relevant area.[3/] Defendants must take all reasonable steps necessary to accomplish the divestitures, and shall cooperate with bona fide prospective purchasers and, if one is appointed, with the trustee.

If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

B. Additional Injunctive Relief

1. United States's Prior Approval of Any Subsequent Acquisitions by Defendants of Commercial Waste Collection and Waste Disposal Competitors in Certain Highly Concentrated Markets

The Final Judgment, § VII, also requires that for a five-year period after its entry, defendants must seek and obtain written approval from the United States before acquiring any

[3] The proposed Final Judgment in this case, like the decree pending in *United States v. USA Waste Services, Inc.*, No. 98 CV 1616 (N.D. Ohio, filed July 17, 1998), also prohibits defendants from *reacquiring* any of the assets divested under the terms of the decree. *See* Judgment, §VIII(C). While the injunctive provisions of antitrust divestiture decrees logically and implicitly proscribe reacquisition of divested assets, the unique circumstances of this industry, which is rapidly consolidating and where there have been instances of the same assets changing hands several times as a result of such consolidation, dictated that the United States make this proscription explicit in this case.

person engaged in the provision of small container waste collection service or the disposal of municipal solid waste in the Atlanta, Boston, Charlotte, Chicago, Davenport, IA/Moline, IL, Evansville, Kalamazoo/Battle Creek, Joplin/Lamar, or Springfield areas, where the acquired person had reported annual revenues of at least $1 million or the purchase price of the person's assets is at least $1 million. This notice and prior approval provision will assist the United States in preventing potentially significant acquisitions by Allied of smaller waste industry rivals in already highly-concentrated markets in transactions that otherwise would fall outside the reporting thresholds of the Hart-Scott-Rodino Act. Allied, BFI and other leading waste industry firms have recently made a number of such acquisitions, which, taken together, have significantly increased concentration, and substantially reduced competition, in many local waste markets.

2. Modification of Consent Decrees in Prior Waste Cases Involving the Defendants

Finally, the Final Judgment, § VIII, requires Allied and BFI to join the United States in moving to modify the consent decrees in three earlier cases -- *United States v. Allied Waste Industries, Inc.*, 7 Trade Reg. Rep. (CCH) ¶50,860 (D.D.C., *filed and pending* April 8, 1999); *United States v. Browning-Ferris Industries, Inc.*, 1996-2 Trade Cas. (CCH) ¶71,456 (D.D.C. 1996); and *United States v. Browning-Ferris Industries, Inc.*, 1995-2 Trade Cas. (CCH) ¶71,079 (D.D.C. 1995). In essence, the modification would prohibit Allied and BFI, and any person acquired by them, in the St. Louis, Missouri; Dubuque, Iowa and Memphis, Tennessee; and Baltimore, Maryland and southern Florida areas from offering or enforcing evergreen clauses in small container commercial waste collection contracts. The modifications would clarify -- and in some instances, extend -- the scope of these consent decrees, and help eliminate contractual

provisions that significantly deter entry, thus hindering competition in the provision of commercial waste collection services in these five major markets.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its

consent to the proposed Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Allied and BFI. The United States could have continued the litigation to seek preliminary and permanent injunctions against Allied's acquisition of BFI. The United States is satisfied, however, that defendants' divestiture of the assets described in the Judgment will establish, preserve and ensure viable competitors in each of the relevant markets identified by the United States. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Allied's acquisition of BFI from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[4/] Rather,

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[4] 119 Cong. Rec. 24598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[5/]

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discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S. Code Cong. & Ad. News 6535, 6538.

[5] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest' (citations omitted)."[6/]

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case," *Microsoft*, 56 F.3d at 1459. Since "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bring a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

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[6] *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) *quoting United States v. Gillette Co., supra*, 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 26, 1999.

Respectfully submitted,

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Anthony E. Harris
Illinois Bar #1133713
U.S. Department of Justice
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APPENDIX A

Summary of Waste Disposal and Collection Assets That Must Be Divested Under the Proposed Final Judgment

I. Waste Disposal Assets

The proposed Final Judgment, §§ II (C) (1) and (2), IV and V, requires Allied and BFI to divest certain "relevant disposal assets." In general, this means, with respect to each incinerator, landfill or transfer station, defendants must sell, to a purchaser acceptable to the United States, all of their rights, titles and interests in any tangible assets, including all fee and leasehold and renewal rights in the listed incinerator, landfill or transfer station; the garage and related facilities; offices; and any related assets including capital equipment, trucks and other vehicles, scales, power supply equipment, interests, permits, and supplies; and all of their rights, titles and interests in any intangible assets, including customer lists, contracts, and accounts, or options to purchase any adjoining property. The list of disposal facilities that must be divested includes properties in the following locations, under the listed terms and conditions:

A. Incinerator, Landfills and Airspace Disposal Rights

1. Boston, MA

(a) BFI's American Refuel SEMASS waste-to-energy incinerator facility, located at 141 Cranberry Highway (Route 28), Rochester, MA 02576;

(b) Airspace disposal rights at BFI's Fall River Landfill, located at 1080 Airport Road, Fall River, MA 02720, pursuant to which SEMASS may dispose of up to the maximum amount of ash and "bypass" waste, as now defined in the operating permit (or any modifications, amendments or extensions thereto) of Fall River Landfill, for a period of time up to the closure or attainment of permitted capacity of the landfill, *provided*

however, that defendants must commit to operate BFI's Fall River Landfill, and its gate, scale house, and disposal area under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Massachusetts, except as to price and credit terms; and

(c) Airspace disposal rights at Ogden Martin Systems Massburn incinerator, located at 100 Recovery Way, Haverhill, MA 01830, pursuant to which a purchaser or purchasers may dispose as much as 1,150 tons/day of waste, for a ten-year period of time;

2. Charlotte, NC

Allied's Lee County Landfill, located at 1301 Sumter Highway, Bishopville, SC 29010, the sale of which will be required only if the United States, in its sole discretion, concludes, pursuant to Section IV or V of the Final Judgment, that the purchaser of Allied's Charlotte Transfer Station [*see* Section II (B)(4) below] is unacceptable;

3. Chicago, IL

BFI's Zion Landfill, located at 701 Green Bay Road, Zion, IL 60099; BFI's Orchard Hills Landfill, located at 8290 Highway 251, Davis Junction, IL 60120; and BFI's Spoon Ridge Landfill, located at Route 1 and Highway 97, Fairview, IL, 61432;

4. Denver, CO

Allied's Denver Regional Landfill, located at 1141 Weld County Road #6, Erie, CO;

5. Detroit, MI

BFI's Arbor Hills Landfill, located at 10690 West Six Mile Road, Northville, MI 48167;

6. Evansville, IN

Allied's Blackfoot Landfill, located at 2726 East State Road, Winslow, IN 47598;

7. Joplin/Lamar/Springfield, MO

(a) Allied's option to purchase the proposed Southwest Regional Landfill, located at Missouri State Highway M, Township 30N, Range 32 West, Section 34, in Jasper County, MO, which option Allied must exercise or extend so that it will not expire any sooner than 12 months following the entry of the Final Judgment; and

(b) Airspace disposal rights at Allied's Wheatland Regional Landfill, located at Columbus, KS, pursuant to which a purchaser or purchasers can dispose up to 700 tons/day of waste, for a period of time up to three months after the opening of Southwest Regional Landfill, *provided, however*, that for each purchaser of airspace rights (or its designee), defendants must commit to operate Allied's Wheatland Regional Landfill, and its gate, scale house, and disposal area under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Missouri, except as to price and credit terms;

8. Kalamazoo/Battle Creek, MI

Airspace disposal rights at Allied's Ottawa Farms Landfill, located at 15550 68th Street, Coopersville, MI 49404, or BFI's C&C Landfill, located at 14800 P Drive North, Marshall, MI 49068, pursuant to which a purchaser may dispose up to 450 tons/day of waste for up to a ten-year period of time, the sale of which will be required only if the United States, in its sole discretion, concludes, pursuant to Section IV or V of the Final

Judgment, that the purchaser of Allied's Kalamazoo Transfer Station [*see* Section I (B)(9) below] is unacceptable; *and provided, however,* that for each purchaser of airspace rights (or its designee), defendants must commit to operate Allied's Ottawa Farms Landfill or BFI's C&C Landfill, and its gate, scale house, and disposal area under terms and conditions no less favorable than those provided to defendants' own vehicles or to the vehicles of any municipality in Michigan, except as to price and credit terms;

9. Moline, IL

BFI's Quad Cities Landfill, located at 13606 Knoxville Road, Milan, IL 61264;

10. Oakland, CA

BFI's Vasco Road Landfill, located at 4001 North Vasco Road, Livermore, CA; and

11. Oklahoma City, OK

BFI's Oklahoma Landfill, located at 7600 SW 15th Street, Oklahoma City, OK 73128.

B. Transfer Stations

1. Akron/Canton, OH

Allied's RC Miller Refuse Transfer Station, located at 1800 19th Street, Canton, OH;

2. Atlanta, GA

Allied's Southern States Environmental Transfer Station, located at 129 Werz Industrial Boulevard, Newnan, GA 30263; Allied's Fayette County Transfer Station, located at 211 First Manassas Mile Road, Fayetteville, GA 30214; and BFI's Marble Mill Road Transfer Station, located at 317 Marble Mill Road, Marietta, GA 30060;

3. Boston, MA

BFI's Holliston Transfer Station, located at 115 Washington Street, Holliston, MA 01746; BFI's Auburn Transfer Station, located at 15 Hardscrabble Road, Auburn, MA 01501; and BFI's Braintree Transfer Station, located at 257 Ivory Street, Braintree, MA 02184;

4. Charlotte, NC

Allied's Charlotte Transfer Station, located at 3130 I-85 Service Road North, Charlotte, NC 28206;

5. Chicago, IL

BFI's Melrose Park 73300 Transfer Station, located at 4700 W. Lake Street, Melrose Park, IL 60160; BFI's Rolling Meadows Transfer Station, located at 3851 Berdnick Street, Rolling Meadows, IL 60008; BFI's DuKane Transfer Station, located at 3 N 261 West Powis Road, West Chicago, IL 60185; BFI's Northbrook-Brooks Transfer Station, located at 2750 Shermer Road, Northbrook, Il 60062; and BFI's Active/Evanston Transfer Station, located at 1712 Church Street, Evanston, IL 60201;

6. Denver, CO

Allied's Summit Waste Jordan Road Transfer Station, located at 7120 S. Jordan Road, Denver, CO;

7. Detroit, MI

BFI's SDMA Transfer Station, located at 28315 Grosbeck Highway, Roseville, MI 48066; and BFI's Schaefer Road Transfer Station, located at 3051 Schaefer Road, Dearborn, MI 48126;

8. Evansville, IN

Allied's Koester Transfer Station, located at 12800 Warrick-County Line Road, Evansville, IN 47711;

9. Kalamazoo/Battle Creek, MI

BFI's Kalamazoo Transfer Station, located at 28002 Cork Street, Kalamazoo, MI 49001; and

10. Springfield, MO

Allied's Tates Transfer Station, located at Route 2, Box 69, Verona, MO 65769.

II. Commercial Waste Collection Assets

The Final Judgment, §§ II (D), IV and V, also orders Allied and BFI to divest certain "relevant hauling assets" that may be used in the small commercial waste collection business. The assets primarily include routes, capital equipment trucks and other vehicles, containers, interests, permits, supplies, customer lists, contracts, accounts, and if requested by the purchaser of the assets, garages, used to service customers along the routes in the following locations:

A. Akron, OH

Allied's front-end and rear-end loader truck small container routes (hereinafter, "commercial routes") that serve the cities of Akron and Canton and Summit, Stark and Portage counties, Ohio;

B. Boston, MA

Allied's commercial routes and any commercial routes acquired by BFI from Allied or any other person since January 1, 1999 that serve the City of Boston and Bristol, Essex, Middlesex, Norfolk, Suffolk, and Worcester counties, MA;

C. Charlotte, NC

BFI's commercial routes that serve the City of Charlotte and Mecklenburg County, NC;

D. Chicago, IL

BFI's commercial routes that serve the City of Chicago and Cook, DuPage, Will, Kane, McHenry, and Lake counties, IL;

E. Dallas, TX

BFI's commercial routes that serve any nonfranchised or open competition areas of the City of Dallas and Dallas County, TX;

F. Davenport, IA and Moline, IL

BFI's commercial routes that serve the cities of Davenport and Bettendorf, IA; Moline, East Moline, and Rock Island, IL; and Rock Island County, IL and Scott County, IA;

G. Denver, CO

Allied's commercial routes that serve the City of Denver and Denver, Arapahoe, Adams, Douglas and Jefferson counties, CO;

H. Detroit, MI

BFI's commercial routes that serve the City of Detroit, Wayne, Oakland and Macomb counties, MI;

I. Evansville, IN

Allied's commercial routes that serve the City of Evansville, IN and Vanderburgh County, IN, including all of its commercial routes that operate out of Allied's Evansville and Huntingburg garage facilities;

J. Kalamazoo/Battle Creek, MI

BFI's commercial routes that serve the cities of Kalamazoo and Battle Creek and Kalamazoo and Calhoun counties, MI;

K. Oklahoma City, OK

BFI's commercial routes that serve Oklahoma City and Oklahoma County, OK;

L. Rock Falls/Dixon, IL

Allied's commercial routes that serve the cities of Rock Falls and Dixon and Lee and Whiteside counties, IL;

M. Rockford, IL

Allied's commercial routes that serve the City of Rockford, IL, and Ogle and Winnebago counties, IL; and

N. Springfield, MO

Allied's commercial routes that serve the City of Springfield and Greene and Christian counties, MO.

Appendix B

Agreement Regarding Routes that Partially Serve an Area in the Judgment or Obtain Revenues from Commercial and Other Types of Customers

U.S. Department of Justice

Antitrust Division

City Center Building
1401 H Street, NW
Washington, DC 20530

July 19, 1999

BY FACSIMILE and US MAIL

Tom D. Smith, Esquire
Jones, Day, Reavis & Pogue
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Fulbright & Jaworski L.L.P.
801 Pennsylvania Avenue, NW
Washington, DC 20004-2615

Re: *Proposed Final Judgment in United States v. Allied Waste Industries, Inc. and Browning-Ferris Industries, Inc.*

Dear Messrs. Smith and Foster:

I write regarding several issues not explicitly resolved by language in the proposed Final Judgment.

Section II (D) of the Judgment defines "Relevant Hauling Assets" and does so by reference to whether a defendant's route: (a) is a front-end loader or rear-end loader small container route; (b) "serves" a city or county listed in the Judgment; and (c) solely with respect to Dallas, Texas [Judgment, Section II (D)(5)], serves a nonfranchised or "open competition" area.

The United States and the defendants agree that a defendant's waste collection route is a front-end loader or rear-end loader small container route, which must be divested pursuant to the terms of the Final Judgment, if the route, in its most recent year of operation, generated ten percent or more of its revenues from: (a) front-end loader and rear-end loader small container commercial customers; (b) whose businesses are located in a city or county listed in Section II of the Judgment; or (c) with respect to Section II (D) (5), whose businesses are located in a nonfranchised or open competition area of the Dallas area.

Please sign below if this letter accurately sets forth our agreements with respect to the Final Judgment and you agree that the terms set forth herein are enforceable pursuant to the terms of the Final Judgment.

Sincerely yours,

Anthony E. Harris
Attorney
Litigation II Section

ON BEHALF OF ALLIED WASTE INDUSTRIES, INC.

_____
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FOR BROWNING-FERRIS INDUSTRIES, INC.

_____
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